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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. **588**

EDNA G. RANDALL, Administratrix of the Estate of Francis E. Randall, Deceased, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Citation to opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement of the case	4
Reasons for granting the writ	7
Conclusion	14
Appendix A (July 21, 1960, opinion)	1a
Appendix B (April 21, 1960, opinion)	13a

CITATIONS

Cases:

Brown v. Southern R. Co., 204 N.C. 668, 169 S.E. 419	13
Coleman v. Moore, 108 F. Supp. 425 (D.C.D.C.)	11
Dahn v. Davis, 258 U.S. 421	9
Eastern Air Lines v. Union Trust Co., 221 F. 2d 62 (App. D. C.)	5
Eastern Air Lines v. Union Trust Co., 239 F. 2d 25 (App. D. C.)	5
Lewis v. United States, 190 F. 2d 22 (App. D. C.)	10
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406	11, 13
Rankin v. Shayne Brothers, Inc., 234 F. 2d 35 (App. D. C.)	11
Southern R. Co. v. Hawkins, 35 App. D.C. 313	11
Tate v. Nelson, 71 F. Supp. 465 (D.C.D.C.)	11
Union Trust Co. v. United States, 113 F. Supp. 80 (D.C.D.C.)	5
United States v. Union Trust Co., 350 U.S. 907	5

Miscellaneous:

Sec. 27, Federal Employees' Compensation Act	2, 5, 8, 10
Sec. 201 (b), Federal Employees' Compensation Act	3, 4, 12
Tort Claims Act	12
16 D. C. Code 1201	11
S. Rep. 836, 81st Cong., 2d Sess.	10
H. Rep. 677, 64th Cong., 1st Sess.	9
Hearings, Committee on the Judiciary, H. R., 63rd Cong., 2d Sess.	9

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on July 21, 1960.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals rendered on July 21, 1960, is reported at 282 F. 2d 287 and is reprinted as Appendix A hereto. The original opinion of the Court of Appeals, rendered on April 21, 1960, and vacated on May 10, 1960, is unreported, but is reprinted as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1960. A petition for rehearing *en banc* was denied on September 19, 1960. This petition for a writ of certiorari is filed less than ninety days after the denial of the rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 27 of the Federal Employees' Compensation Act, requiring that the United States be reimbursed for compensation payments out of any recovery from a tort-feasor where the death is caused "under circumstances creating a legal liability in some person other than the United States to pay damages therefor," is applicable where a judicial determination has been made that the United States is jointly responsible for the death.

2. Whether the United States, having been judicially found jointly responsible for the death of one of its employees, can escape completely its liability in the form of compensation payments through application of Section 27 of the Federal Employees' Compensation Act.

STATUTE INVOLVED

The relevant statute under which the United States is asserting its lien in this case is Section 27 of the United States Employees' Compensation Act, 5 U.S.C.A. § 777, which reads in pertinent part:

> "If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability in some person other than the United States to pay damages

therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his own behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States . . . Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund."

* * * * * * * * *

Also involved is Section 201(b) of the Compensation Act, 5 U.S.C.A. § 757(b), making the provisions of the Act the exclusive remedy of federal employees and their beneficiaries against the United States:

"(b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: . . ."

STATEMENT OF THE CASE

The facts of this case are not in dispute. On November 1, 1949, an Eastern Air Lines passenger plane collided in mid-air with a Bolivian military-type plane while approaching a runway at the Washington, D. C., National Airport. The Eastern plane was cut in two and all 55 passengers aboard were killed. Petitioner's husband, an employee of the Federal Government traveling in the course of his duties, was among those killed.

On October 26, 1950, petitioner, as administratrix of her husband's estate, filed this suit in the United States District Court for the District of Columbia against Eastern Air Lines, Inc., and others, claiming that the defendants negligently caused the death of her spouse. A stipulation was then filed in this case whereby the petitioner agreed to be bound on the question of the liability of the various defendants, including the United States, named in the so-called *Miller* cases in the District Court.[1] The *Miller* cases involved two other passengers, not employed by the Government, killed in the crash.

The *Miller* cases resulted in a final determination, binding in all the cases including the instant one grow-

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[1] In this case, Eastern Air Lines on October 6, 1953, filed a motion asking leave to add the United States as a third party defendant. This motion by stipulation was held in abeyance pending the outcome of the *Miller* cases and no formal action was ever taken upon it.

Petitioner, of course, was limited as against the United States to her claim under the Federal Employees' Compensation Act, which by its terms provides the exclusive remedy against the United States for injuries or deaths of federal employees. Section 201(b), 5 U.S.C.A. § 757(b).

ing out of the crash, that the United States and Eastern Air Lines were concurrently and equally responsible for the death of all the passengers on the plane. *Union Trust Co.* v. *United States*, 113 F. Supp. 80 (D.C.D.C.); *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (App. D.C.); *United States* v. *Union Trust Co.*, 350 U.S. 907; *Eastern Air Lines* v. *Union Trust Co.*, 239 F. 2d 25 (App. D.C.), cert. denied, 353 U.S. 942.

Subsequently, Eastern Air Lines negotiated a settlement with the petitioner, as administratrix of her husband's estate, whereby Eastern was released of all causes of action by the petitioner growing out of the accident in consideration of the payment of $37,500 to petitioner. This settlement was approved by the District Court.

In the meantime, the petitioner, as the widow of her spouse, was receiving over a period of time the sum of $17,165.50 from the United States as compensation in accordance with the provisions of the Federal Employees' Compensation Act, 5 U.S.C.A. § 751, et seq. These payments ceased upon petitioner's remarriage, as provided by the Act, 5 U.S.C.A. § 760 (A).

The sum of $37,500, the settlement figure approved by the District Court, was paid into that court's registry by Eastern Air Lines following notification that the United States was asserting a lien on $17,165.50 of that sum. This lien claim was based on the provision of Section 27 of the Federal Employees' Compensation Act, 5 U.S.C.A. § 777, to the effect that the United States may obtain a refund of any compensation paid to a beneficiary under the Act where the injury or death "is caused under circumstances creating a legal lia-

bility in some person other than the United States to pay damages therefor" and where the said beneficiary receives any money or property in satisfaction of the liability of such other person.

The District Court, with the consent of all parties concerned, then directed that all but $17,165.50 of the $37,500 on deposit be disbursed to petitioner and her then attorneys. The United States having petitioned to enforce its lien and the petitioner having filed a formal claim to the $17,165.50, cross motions for summary judgment were filed. The District Court thereafter granted judgment for the United States. This appeal followed, the payment of the $17,165.50 having been stayed pending the outcome of the appeal.

On April 21, 1960, following oral argument before it, the Court of Appeals unanimously reversed the judgment of the District Court and held that summary judgment should have been awarded to petitioner. The Court ruled that the United States was not entitled to recoupment of the $17,165.50 since the compensation in that amount had been paid to the widow while the $37,500 tort recovery was by the administratrix, it being improper to recoup payments to the widow from payments to the administratrix even where the widow and administratrix are one and the same person. See Appendix B hereto, pp. 13a-19a, *infra*.

But on May 10, 1960, the Court of Appeals ordered, *sua sponte*, "that the opinion and judgment of this Court entered herein April 21, 1960 are vacated." No reason was given for this action and no opportunity was afforded the parties to present further arguments in support of or in opposition to the April 21 opinion.

Then on July 21, 1960, by a 2-1 vote, the Court of Appeals without reference to its prior actions reversed itself and held that the United States was entitled to a statutory refund to the extent that the refund does not exceed the widow's share of the tort recovery from Eastern Air Lines. Judge Wilber K. Miller filed a dissenting opinion. Finally, on September 19, 1960, a petition for rehearing *en banc* was denied, Judge Miller noting that he "would grant the petition."

REASONS FOR GRANTING THE WRIT

This case involves an important and novel issue arising under the Federal Employees' Compensation Act. And the resolution of that issue by the court below creates an unwarranted and discriminatory hardship on beneficiaries of federal employees killed by reason of the joint negligence of the United States and a third party.

1. Never before has it been necessary to determine what effect the judicially determined negligence of the United States has upon its right to recoup compensation payments under the Federal Employees' Compensation Act out of the proceeds of a tort recovery from a joint tort-feasor. This problem is of obvious importance in the administration and application of the Compensation Act. As the manifold activities of the Federal Government continue to expand, the chances of its negligence playing a part in the death or injury of its employees traveling on official duty necessarily increase. And the problem thus becomes one of continuing and perhaps growing importance.

2. The difficulties implicit in resolving this issue are made clear by the sharp division of opinion within

the Court of Appeals. The rather summary ruling of the majority that it is immaterial to the application of Section 27 of the Compensation Act that the negligence of the Government was one cause of the fatal accident has been countered by a detailed and comprehensive analysis in the dissenting opinion that compels the precisely opposite conclusion. Even more dramatic was the action of the Court of Appeals in first announcing a unanimous decision in petitioner's favor and then withdrawing that opinion, thereby indicating the intrinsic importance and uncertainty posed by the issue at stake. Only this Court can definitively resolve this knotty problem.

3. In holding that the Government's judicially determined negligence is immaterial to the application of Section 27 of the Compensation Act, the court below has misconstrued and misapplied the Act with the result that an unwarranted and discriminatory hardship has been imposed on beneficiaries of federal employees killed in the line of duty.

(a) The whole thrust of the Compensation Act is to provide compensation to federal employees and their beneficiaries for injuries or deaths without regard to the question of negligence on the part of the Government. But Section 27 of the Act provides for recoupment by the Government of such compensation payments only where the injury or death was "caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor". The sparse legislative history of Section 27 indicates that Congress was here thinking of recoupment only in terms of a situation where the Government was not in any way at fault or where the ques-

tion as to the Government's negligence remained unresolved.[2] Nowhere was there any real indication that the legislative authors even contemplated, much less intended, that Section 27 might be applied to compel the return of compensation payments where there had been a judicial determination that the Government was wholly or partly at fault. And this Court, in *Dahn* v. *Davis*, 258 U.S. 421, 430, referred to Section 27 only in terms of situations involving the liability of persons "other than the United States."

(b) The statutory interpretation adopted by the court below leads to an incongruous and illogical result. If the United States alone were guilty of negligence, it obviously would have to bear the full burden of its compensation payments and Section 27 would not apply. But where, as here, a third party is jointly negligent with the United States, the theory of the court below would permit the United States to free itself of all financial responsibility and shift the entire burden to the third party. The United States is in effect made whole for the financial burden (in the form of compensation payments) put upon it by reason of its own

[2] See the definitive legislative report (H. Rep. No. 677, 64th Cong., 1st Sess., pp. 11-12, 1916) dealing with Section 27, where the legislative draftsmen spoke of the applicability of that provision where "the injury or death for which compensation is payable is caused by the negligence of some person other than the United States". And in the hearings leading to the issuance of that report, a prominent spokesman who apparently participated in drafting Section 27 emphasized that it was only fair to compel a return of compensation paid by the Government where recovery was had from a third party since the employee "is receiving compensation where the United States has been guilty of no fault at all". Hearings on Federal Employees Compensation, Committee on the Judiciary, H.R., 63rd Cong., 2d Sess., Serial 16—Part 2, pp. 62-64.

negligence. Such an inequitable result ought not to result without an explicit legislative direction to that effect.

(c) The underlying rationale of Section 27, and the one advanced by the Government in the courts below, is that the employee or his beneficiary should not be allowed to retain a double recovery for the same tort. See *Lewis* v. *United States*, 190 F. 2d 22 (App. D.C.). But that exemplary principle is not germane in the instant situation, thereby further demonstrating the inapplicability of Section 27.

By reason of its part in causing the fatal accident, the United States made compensation payments to the *widow* of the decedent in order, as the legislators have put it, "to meet ordinary living expenses under prevailing economic conditions" and to help foreclose "the necessity of seeking charity or reliance upon the help of friends". S. Rep. 836, 81st Cong., 2d Sess., 2 U.S. Code Cong. Serv. Leg. Hist. 2125 (1949). In other words, the United States here paid the widow $17,165.50 so that she would not become a public or private charge. Such payments had no relationship to any permanent loss she or the next of kin may have suffered; and they abruptly ceased upon her death or remarriage.

On the other hand, the tort recovery against Eastern was premised on something entirely different than a desire to give the widow enough to live on until she remarried or died. It was a recovery by the *administratrix* on behalf of the widow and any other next of kin who might have survived and was not limited by the extent of ordinary living expenses or by any mere

desire to preclude reliance on charity or friends." The damages, by terms of the relevant statute (16 D.C. Code § 1201), were determined with reference to the permanent or lifetime injury to the spouse and next of kin as of the time of death. *Tate* v. *Nelson*, 71 F. Supp. 465 (D.C. D.C.); *Southern Ry. Co.* v. *Hawkins*, 35 App. D.C. 313; *Rankin* v. *Shagna Brothers, Inc.*, 234 F. 2d 35 (App. D.C.); *Coleman* v. *Moore*, 108 F. Supp. 425, 427 (D.C. D.C.).

Here the United States has neither alleged nor proved that the $37,500 settlement with Eastern represented any part of the factors entering into the determination of the compensation payments by the United States.[3] And in the absence of such identity of factors, there cannot be any double recovery justifying recoupment of the $17,165.50 by the United States. Thus this Court's decision in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, relied upon by the court below, is readily distinguishable; there the Court carefully noted (p. 412) that the tort verdict, "includes sums for past loss of wages and medical expenses which it is argued were the very items on account of which Hawn's employer paid him" compensation. The double recovery involved in *Hawn* is completely absent here.

(d) As pointed out by the dissenting opinion of Judge Miller, it is not to be supposed that Congress, by making the Compensation Act the exclusive remedy against the Government for injuries and deaths of

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[3] Indeed, it is reasonable to assume that the $37,500 settlement represented the damages Eastern Air Lines felt were properly owing after giving due allowance for the $17,165.50 already received by petitioner as widow from the United States.

federal employees, intended to discriminate against such employees and their beneficiaries where the Government was partly at fault. Yet the result below creates precisely that discrimination. See pp. 10a-11a, *infra*.

Before the Tort Claims Act was passed in 1946, 28 U.S.C. §§ 1346, 2671-2678, 2680, the federal employee or his beneficiary had no alternative but to pursue compensation claims under the Compensation Act. When the Tort Claims Act came into existence, such a person for the first time had the alternative of suing the United States, as well as the third party tort-feasor, for damages. But by amending the Compensation Act in 1949 to make it the exclusive remedy for the federal employee or his beneficiary where the Government is negligent, Congress in effect withdrew the Tort Claims Act remedy and confined the Government's tort liability to compensation payments under the Compensation Act. Section 201(b), 5 U.S.C.A. § 757(b). In effect, the equality created in 1946 was continued in 1949; the tort liability of the Government was simply confined to the Compensation Act.

The result below, however, involves an inequitable assumption that the Compensation Act, despite the 1949 amendment, can be applied so as to exclude completely such tort liability and such payments. Federal employees and their beneficiaries, having been placed in a status of equality in 1946 with non-Government employees and their beneficiaries, are now told by the court below that they must forego all hope of obtaining any tort recovery against the Government despite its admitted negligence and must disgorge any compensation payments received in satisfaction of that tort liability wherever and whenever a recovery is had from

the joint tort-feasor. No mandate from Congress compels that discriminatory result.

Nor does anything in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, so apparently crucial to the Government's position, compel that result. That case involved Section 33 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 933, which creates considerations differing from those arising from Section 27 and Section 201(b) of the Compensation Act. Section 27 of the latter Act must be read and applied against the legislative background of changing legal rights resulting from the passage of the Tort Claims Act and of Section 201(b) of the Compensation Act. And *Pope & Talbot* was decided without reference to the facts and the contentions brought to bear by petitioner in this case.

In brief, the Government's "hands ought not to have the blood of the dead or injured workman upon them, when . . . [it] thus invokes the impartial powers and processes of law" to assert the lien given it by Section 27. See *Brown* v. *Southern R. Co.*, 204 N.C. 668, 169 S.E. 419. When the Government has been found negligent, by virtue of a binding judicial determination, only the clearest legislative language should justify stripping the beneficiary of a deceased federal employee of his right to keep the payments received in recognition of the Government's tort liability. No such language is apparent.

CONCLUSION

The decision below is not only important, novel and unsupported by statutory language or history but is contrary to the liberal and humanitarian spirit which should pervade the interpretation of workmen's compensation laws. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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